Supreme Court, U.S.
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No. 06-1095

IN THE

Supreme Court of the United States

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Petitioner,

v.

LEONARD BOLDEN,

Respondent.

On Petition for a Writ of Certiorari from the Supreme Court of Pennsylvania

PETITIONER SEPTA'S REPLY TO APPELLEE'S BRIEF IN OPPOSITION TO CERTIORARI

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REPLY TO ARGUMENTS RAISED IN RESPONDENT'S OPPOSITION TO CERTIORARI

I. Respondent's Claim That Review Of The Petition Requires This Court To Examine The Factual Findings Is Unfounded.

Respondent argues that if this Court accepts the Petition, it will have to immerse itself in the factual findings of the courts below. This is markedly inaccurate. Petitioner's Statement of the Case has never been controverted. A review of the trial court and Commonwealth Court decisions reveals that the factual record was never in contest. Critically, the trial court and the Commonwealth Court recognized that the MU rail car consisted of a separate passenger compartment and a separate operating compartment. The lower court and the Commonwealth Court acknowledged that Mr. Bolden's injury occurred upon entering the passenger compartment. Both courts also recognized that the door closer, which caused the injury, was attached to a door leading into the seating compartment and not the operating compartment. (*See* App. at 12a.) Respondent's Counter-Statement of the Case neither controverts these important and uncontested facts nor, for that matter, any other facts in Petitioner's Statement of the Case.

Respondent asserts that the engineer, Mr. Fallis, sat in the passenger compartment and *implies* that this point eviscerates the structural and functional distinction between the MU operating compartment and the MU passenger compartment. Respondent, however, has not disputed that Mr. Fallis entered the MU operating cab by ascending a ladder attached to the operating compartment. That Mr. Fallis, thereafter, entered the passenger seating compartment

and sat down before he initiated train operations is no different from any engineer sitting in a passenger car and reading a newspaper before undertaking the operation of a locomotive; nor does Respondent dispute that the MU operating cab has a locked cab door preventing entry during train operation and only the engineer is in the cab.[1]

Respondent's statement that one of the conductors left a bag in the operating cab is neither relevant nor evidence that conductors perform their work in the operating cab. It is uncontested that conductors do not perform their duties in the operating cab. As vigorously as Respondent attempts to spin its arguments, Respondent cannot offer any factual assertions to contravene Petitioner's Statement of the Case and, indeed, neither the Commonwealth Court nor the trial court have disputed these facts in reaching their erroneous decisions. To the contrary, the facts forming Petitioner's Statement of the Case are evident in both opinions.[2]

Accordingly, this Court does not have to make any factual determinations or "immerse" itself in the facts which were determined below because they are uncontested.

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[1] Respondent does not challenge the FRA safety regulations which treat the MU operating cab in a significantly different manner than the MU passenger compartment. (*See* Pet. at pg. 25-26.)

[2] The Supreme Court will usually deny certiorari when the Petition requests the Court "to [only] review evidence and discuss specific facts." *See United States v. Johnson*, 268 U.S. 220, 227 (1928); *Texas v. Mead*, 465 U.S. 1041 (1984). This Court will examine facts when a finding of fact is so

(footnote continues)

II. Respondent Erroneously Claims That Petitioner Is Asking This Court to Review The Pennsylvania Appellate Court's Application Of *Lunsford*.

It is incredulous for Respondent to contend that Petitioner is requesting this Court to review the Commonwealth's Court's application of *Southern Railway Co. v. Lunsford*, 297 U.S. 398 (1936) to the instant claim. Petitioner has appealed the obvious error below. Pennsylvania appellate courts have refused to apply the *Lunsford* test. Instead, the Pennsylvania Courts have embraced an analysis that limits *Lunsford* to a narrow class of claims and have determined, *ipse dixit*, that *Lunsford* is not controlling precedent in claims asserting a failure to maintain a part or appurtenance under the BIA. In no less than four pronouncements, the Commonwealth Court and the trial court opined, without any supporting authority, that *Lunsford* did not apply to claims that a rail carrier failed to maintain a part or appurtenance under the BIA. This is the gravamen of the Petition. Nothing Respondent argues can change how the Commonwealth Court has ruled and its ensuing divergence from all precedent under the BIA. (App. 6a, 7a; 23a-25a.)

(footnote continued)
intermingled with a conclusion of law that it is necessary when examining a federal question to analyze the facts. *See, e.g, Fiske v. Kansas*, 274 U.S. 380, 385-86 (1927). A mixed question of law and fact has not precluded this Court from accepting Petitions for Certiorari. For example, this Court in *Lunsford* examined whether the Little Watchman, was a "part or appurtenance" under the BIA. Clearly, cases involving the application of federal law may involve questions of mixed law and fact.

Respondent's fallacious contention is advanced in support of its effort to have this Court conclude that Petitioner has not demonstrated that the Commonwealth Court's decision is in conflict with *Lunsford* and seventy years of jurisprudence applying the *Lunsford* test. Respondent is aspirational (or hopeful) that this Court will overlook the unmistakable core and central premise of the Commonwealth Court's decision. Respondent's argument that Petitioner is challenging the Commonwealth Court's application of *Lunsford*, at best, is fanciful.

Petitioner is appealing the Commonwealth Court's unprecedented refusal to apply *Lunsford* which has led to an unwarranted extension of strict liability to a passenger seating area which neither Congress nor the *Lunsford* Court intended. This outcome alone warrants taking the Petition notwithstanding the clear conflict.

III. Respondent's Claim That The Commonwealth Court Applied The *Lunsford* Test Suffers From The Same Malady Of Distortion As Respondent's Other Arguments Concerning Petitioner's Writ.

The Commonwealth Court was very clear that it approved the trial court's decision to pigeon-hole *Lunsford* into cases concerning experimental devices or claims that a railroad failed to install a device. This is the central premise of the flawed analysis and errant ruling of the Commonwealth Court. It cannot be seriously argued that the Commonwealth Court, after it concluded that *Lunsford* was inapplicable, followed this Court's decision in *Lunsford*.

Adopting an unprecedented reading of *Lunsford*, the Commonwealth Court affirmed the trial court's decision to eschew applying the *Lunsford* test of a "part or appurtenance:"

> In applying the language of *Lunsford*, the trial court reasonably distinguished that holding based upon factual differences between *Lunsford* and the present case. *Lunsford* clearly controls cases where experimental devices are used in carriers or carriers have failed to install required equipment. The present case deals with a failure to maintain equipment that is useful and increases safety on a locomotive car, but is neither experimental nor required. [App. 6a-7a]
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> * * *
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> This Court notes SEPTA's extensive arguments that the *Lunsford* test of "integral or essential" was not applied by the trial court in determining whether the closing mechanism was a "part or appurtenance" under the LIA. We reject that argument on the ground that the trial court correctly distinguished the facts of this case from the *Lunsford* case's facts and holding. [App. 8a-9a]

In a further renunciation that *Lunsford* is controlling precedent, the Commonwealth Court opined in *obiter dictum* that "we do not believe that the closing mechanism would necessarily fail the *Lunsford* test." *See Hans v. Louisiana*, 134 U.S. 1 (1890) (*obiter dictum* is a discussion "unnecessary to the decision and in that sense extrajudicial"). Implicit to the lower court's *obiter dictum* is that *Lunsford* is

one of several tests to determine whether a part or appurtenance is covered under the BIA. It is plain that the Commonwealth Court's decision is not grounded in applying *Lunsford*. Rather, the driving rationale of the Commonwealth Court's decision was to renounce *Lunsford* and cobble together its own test under the BIA.

Respondent's argument that the Commonwealth Court's decision is an application of *Lunsford* is a Houdini effort to transform a decision that emphatically renounces application of *Lunsford* into a decision that applies *Lunsford*. The basis for this "head over heels" transformation is the *obiter dictum* of the Commonwealth Court. The Commonwealth Court, however, was unwavering in its ruling that *Lunsford* has no application to the instant claim of a defective part. Having found that *Lunsford* only applied to failure to install claims or experimental devices, it cannot be seriously argued that the Commonwealth Court has applied *Lunsford* in reaching its decision.[3]

Respondent's ill-conceived argument is offered in furtherance of its effort to portray the Commonwealth Court's decision as consistent with controlling precedent and not a departure from *Lunsford* and all BIA jurisprudence. Respondent pleas for this Court to ignore the Commonwealth Court's specific affirmance of the trial court's refusal to apply *Lunsford*, and *its* adoption of the *same* rationale

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[3] *See Dougherty v. Underwriters at Lloyds*, 6 F.3d 856, 861 (1st Cir. 1993) ("*Dictum* is a term that judges and lawyers use to describe comments relevant but not essential to the disposition of legal questions pending before a court" (internal citations omitted)).

consigning *Lunsford* to the dust bin of historical irrelevancy. This necessarily follows since over 99% of the cases concerning a "part or appurtenance" under the BIA proffer the claim that a carrier failed to maintain an item on a locomotive.

Respondent cannot dispute that the reasoning central to the Commonwealth Court's decision was that *Lunsford* is inapplicable to failure to maintain claims, the precise type of claim at issue here. The courts of Pennsylvania have failed to follow controlling precedent in the determination of a part or appurtenance under the BIA. Pennsylvania courts have departed from this Court's seminal decision in *Lunsford* and run counter to the body of jurisprudence applying *Lunsford*.

A split in the decisional law governing a federal statute cannot be denied.

IV. Respondent's Argument That Petitioner Is Dissatisfied With The Court's Application Of *Lunsford* Is Remarkably Askew.

Respondent's argument that Petitioner is dissatisfied with the Commonwealth Court's application of *Lunsford* is an extraordinary effort of distorting the Petition and the lower court's decision. A review of the Petition for Certiorari leaves little doubt that Petitioner is not arguing that the Commonwealth Court misapplied *Lunsford*. Petitioner is challenging the Commonwealth Court's unprecedented departure from *Lunsford*.

Respondent's argument is a part of its exertions to convince this Court that the Pennsylvania courts have not renounced *Lunsford* and have not developed their own test to determine whether an item is a "part

or appurtenance" under the BIA. Respondent is hopeful that this Court will ignore the Commonwealth Court's (1) central premise; (2) rationale; and (3) holding that *Lunsford* is not controlling precedent in failure to maintain claims.

Respondent's argument relies on the Commonwealth Court's *obiter dictum* that the door closer nonetheless would meet the *Lunsford* test. After having found *Lunsford* inapplicable and not controlling, Respondent cannot transform the Commonwealth Court's decision into an application of *Lunsford*. It cannot be seriously argued that this Court should conclude that the Commonwealth Court has applied *Lunsford* since its core premise is that *Lunsford* is not controlling precedent in a failure to maintain claim.

A remarkable split in the jurisprudence governing a federal statute has occurred. The Commonwealth Court's defiance of the *Lunsford* decision has resulted in the extension of strict liability in a manner that controverts Congressional intent supporting the passage of the BIA.

V. Respondent's Assertion That Post-*Lunsford* BIA Claims Are Analyzed Differently Is Unsupportable.

Respondent asserts that the Commonwealth Court's decision aligns with "the post-*Lunsford* distinction between failure to maintain and failure to install cases." (Respondent's Opposition at pg. 9.) Respondent has neither quoted nor given attribution to *any* court that has ruled that these two types of claims are to be analyzed differently *or* that the *Lunsford* test is not applicable to failure to maintain

claims. Respondent has yet to establish where in the BIA jurisprudence this distinction is drawn.

Post-*Lunsford* decisions do not employ a different analysis when evaluating these two theories proffered in support of BIA claims. Most certainly, no court has relegated *Lunsford* to a specific theory, shunted *Lunsford* aside and discounted its application to failure to maintain claims – the vast majority of cases under the BIA.

CONCLUSION

There is a marked conflict between this case, *Lunsford's* seminal decision and all other federal and state court tribunals interpreting the BIA.

Public policy grounds alone mandate that *certiorari* be granted, to correct this unwarrented extension of strict liability

Respectfully submitted,

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